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JOHN F. DAVIS, CLE

No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA,

Appellant,

vs.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., THE VAL CORPORATION,

On Appeal from the United States District Court for the Eastern District of Wisconsin

MOTION OF PABST BREWING COMPANY TO AFFIRM

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MOTION OF PABST BREWING COMPANY TO AFFIRM

Pabst Brewing Company[1] pursuant to Rule 16 of the

[1] Throughout this brief Pabst Brewing Company is referred to as "Pabst"; Blatz Brewing Company, the assets and business of which Pabst acquired from Schenley Industries, Inc., is referred to as "Blatz." The Jurisdictional Statement is cited as "J.S."; the Opinion of the trial court, Appendix A of the Jurisdictional Statement, is cited as "Op. . . . " The Findings of Fact and Conclusions of Law, Appendix B of the Jurisdictional Statement, are cited by the specific finding or conclusion number "F. . . . " or "C. . . . "

Revised Rules of this Court moves that the judgment of the district court be affirmed on the ground that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a final judgment of the district court sustaining Pabst's motion to dismiss, filed at the close of the plaintiff's case pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, on the grounds that the plaintiff failed to meet its burden of proving a violation of Section 7 of the Clayton Act (C. 4, 5, 6; J.S. 73a). The Pabst acquisition of the assets and business of Blatz was made in July, 1958 after Pabst sales had declined almost 50% during the preceding six years (F. 15, J.S. 51a). The complaint charged that the acquisition may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of beer in the United States, in the area comprising the three states of Wisconsin, Illinois and Michigan, and in the state of Wisconsin alone (Op., J.S. 1a; F. 4, J.S. 46a). At the time of the acquisition, Pabst ranked 11th in the sale of beer by breweries in the United States, accounting for approximately 2.67% of national beer sales, while Blatz ranked 13th and accounted for 2.04% (F. 16, J.S. 51a-52a).

Prior to trial, counsel for the government told the court that its representatives had interviewed 404 brewers, distributors and maltsters, and trial subpoenas were issued for 39 brewers, 24 distributors and 8 maltsters (F. 8, J.S. 48a).[2] Two court days before the trial, however, the gov-

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[2] Counsel told the court that "the government will call brewer witnesses to testify about the actual competitive situation in the beer industry. This is an invaluable and time honored mode of evidence in antitrust cases where the effect on competition is an issue. See for instance, *United States* v. *Philadelphia National Bank et al., supra*, at pages 367-369" (Op., J.S. 4a).

ernment notified the court that no witnesses would be called, giving no explanation other than a desire to "reduce the number of witnesses and thus narrow the issues" (Op., J.S. 6a). Its evidence was limited to statistical and documentary exhibits plus brief excerpts from two depositions (F. 12, J.S. 50a).

The government now seeks a *de novo* review of the limited evidence which it presented, but Pabst submits that a plenary review is unnecessary because the documents before the Court provide a clear and reliable basis for upholding the judgment of dismissal for failure of proof and the review of the record sought by the government would be fruitless. Whatever evidence is regarded by the government as justifying reversal has undoubtedly been summarized in the Jurisdictional Statement. The trial judge's conclusions were not based on any exclusions of offered evidence, but were compelled by gaps in the proof resulting from failure to produce evidence. These gaps will be plainly seen from the opinion and findings (J.S. 1a-76a), and from the concessions made by the Jurisdictional Statement itself.

The Jurisdictional Statement, in its "Questions Presented," its "Statement" and its argument has misinterpreted the trial court's findings, conclusions and opinion, has erroneously stated facts in the record and has sought through the introduction of matters completely *dehors* the record to convince this Court that the questions involved are substantial. Fortunately, simple reference to the trial court's opinion will demonstrate these government errors and will also show that nothing really novel or substantial is involved in this case. The questions are only issues of fact common to all merger cases.

THE QUESTIONS PRESENTED

The government poses two questions (J.S. 2), both of which incorrectly represent the holding below and enormously exaggerate the asserted errors.

The first question attacks the trial court for "disregarding a marked industry trend toward concentration;" but, the court did not disregard any trend toward concentration which had been proven. Rather, as the judge stated, "No evidence was introduced to explain the relevancy or significance" of the statistics adduced on the issue (F. 49, J.S. 69a), and the evidence "absolutely fails to establish a trend toward concentration in the beer industry" (Op., J.S. 32a).

If this appeal presents any concentration issue, it is whether the trial judge reasonably concluded that the government had failed to prove concentration or a significant trend toward concentration in the beer industry. Even if, as the government contends, the court believed that concentration must be shown to be due to past mergers before a violation can finally be established on such grounds, the government's first question is purely hypothetical in the absence of proof that concentration or a trend toward concentration existed in the beer industry.

The second question states that the court held that the "only relevant market was the national market." But the court did not so hold. It is true that the court treated the nation as a whole as a relevant market, but this was because the government itself stipulated that the national market was a relevant market (Op., J.S. 2a; F.5,

J.S. 47a).[3] What the court held, and all that is subject to appeal on this issue, was that "the plaintiff has not satisfied its burden of proving that Wisconsin or the three-state area is a relevant geographic market" (Op., J.S. 8a; F. 17-42, J.S. 52a-63a; C. 4, J.S. 73a). As will be pointed out, the inadequacy of the government's proof on this question gave the court no alternative.

Restated correctly, the questions for appeal which fairly lie within the issues selected by the Jurisdictional Statement are whether the trial court erred in holding:

(1) that there was a failure of sufficient proof of a "marked industry trend toward concentration" having real significance on the issue of the competitive effect of this merger; and

(2) that there was an equal failure of proof that Wisconsin, or the three-state area composed of Wisconsin, Illinois and Michigan, is a relevant market area in which the merger's effect on competition can legally be tested.

THE FAILURE OF PROOF ON THE QUESTIONS PRESENTED IS CLEAR

The issues of whether there is a marked trend toward concentration in the beer industry, and of what is the relevant market, are obviously factual questions depending for their resolution upon information as to the "commercial realities" of the industry, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336-337 (1962). At the trial,

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[3] The Jurisdictional Statement does not mention this stipulation, and indeed seems to dispute the proposition agreed to by government counsel in the court below (J.S. 10, 11, 17, 18, 19 and 27), actually stating at one point that reliance on the national figures would give a "totally misleading impression" (J.S. 27).

however, the plaintiff called no witnesses and attempted to prove its allegations by reliance almost entirely upon statistics (J.S. 4, n. 3). Statistics are necessary in cases of this kind, but they are, of course, no better than the assumptions and calculations upon which they are based. Moreover, interpretation of complex business statistics, especially in making such crucial predictions about the future of competition in an industry as the government seeks to make here, is obviously a task best performed with the help of qualified, informed persons.

Such competent assistance was readily available, but not produced. A court might well infer that government counsel's reason for not calling any of the 71 witnesses whom they had selected out of 404 persons interviewed (F. 8-11, J.S. 48a-50a; Op., J.S. 3a-6a) and who had first-hand knowledge of the significance of statistics relied upon, was that it had been ascertained that their testimony would be damaging rather than helpful; *cf. Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939). The trial judge, however, refrained from drawing such an inference (Op., J.S. 3a-7a). But whether or not such an inference is drawn, these circumstances highlight the incomplete nature of the government's proof and argue for great caution, if not healthy suspicion, concerning the speculations which counsel now make about the supposedly great significance of the statistics.[4]

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[4] The Jurisdictional Statement offers the excuse for the weaknesses in the statistics relied upon that "One must use the statistics available and appraise them as best he can" (J.S. 23). This justification would seem to be less than satisfactory in light of the government's failure to call any of the subpoenaed trade witnesses, all or most of whom could have interpreted the statistics knowledgeably.

1. Failure of Proof of Concentration or Trend Toward Concentration.

The government cannot contend that the beer industry could even remotely be considered as a concentrated industry today. In 1961, by agreed pretrial order the last year for which evidence was offered, there were 162 brewing companies in the stipulated national market, one less than there would have been but for the merger in issue (F. 47, J.S. 68a). The largest firm had less than 10 percent of sales (F. 49, J.S. 69a). 136 companies each sold over 25,000 barrels of beer (JX 44-46). Pabst and Blatz combined ranked third in 1961 and yet had less than 6 percent of sales (F. 45, J.S. 67a).

The government argues what it calls "a dramatic, long-sustained, and still continuing trend toward concentration" in the beer industry (J.S. 14). As proof of such a trend it points to a decline in the number of brewing companies from over 700 in 1934, the first full year after repeal of prohibition, to 162 in 1961 after 27 years of vast economic change including a great depression and two wars,[5] and to shares of national sales by the top 10 or top 25 breweries (J.S. 13-14). But the government has not offered any proof whatever, except the conjectures of counsel, as to

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[5] Without any record support or reference, the Jurisdictional Statement suggests that "The disappearance of numerous small, local companies" was due to "acquisitions or through inability to compete effectively with their large regional and national rivals . . ." (J.S. 15-16). But the court found: "[N]o evidence of any kind was offered by the plantiff as to any reason for the decrease in number of breweries or as to whether the decrease was accounted for by mergers or acquisitions or as to why any brewery may have ceased operations. There is no evidence in the record of any merger or acquisition in the beer industry other than the acquisition of Blatz by Pabst" (F. 48, J.S. 68a).

why its statistics show that this industry will ever reach a position of concentration with any antitrust significance.

The term, "concentration," must of course be used by the government in the same way it is used in the decisions of this Court and in the Congressional Committee reports in connection with the amendments to Section 7. A comparison of the "concentration figures" in this case with those in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), and *United States* v. *Alcoa*, 377 U.S. 271 (1964), cited in the Jurisdictional Statement (J.S. 16), reveals how remote the beer industry is from any meaningful degree of concentration:

	Philadelphia (1)	Alcoa (2)	This Case (3) (1958)
Top firm	36%	29.1%	8.28%
Top 2	59	51.3	15.24
Top 4	78	77.3	25.41

(1) 374 U.S. at 331
(2) 377 U.S. at 278
(3) F. 49, J.S. 68a-69a

The legislative history shows that the relevance of concentration in a merger case is as a measure of whether an industry is non-competitive; that is, where

> " . . . three or four large concerns produce the entire supply. This latter pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rival * * * (The Merger Movement, A Summary Report, pp. 6-7)." S. Rep. No. 1775, 81st Cong., 2d Sess. p. 8 (1950).

This was the kind of "concentration" with which Congress was concerned in amending Section 7. *Brown Shoe Co.* v. *United States,* 370 U.S. at 333.

162 firms in the brewing industry are a long distance from "three or four large concerns" producing the entire supply. An industry in which no firm has as much as 10% of national sales, 14 firms have 2% or more, and 25 have 1% or more, bears no resemblance to the industries in which percentages of leading companies were considered concentrated by this Court (F. 45, J.S. 67a).

The plaintiff sought to meet its burden of proof at trial without expert economic or trade evidence. It depended then and still depends entirely upon the speculative predictions of its lawyers who confidently assume that decline in the number of firms will go on unabated until at some unspecified distant date beer production will be concentrated in a few firms. This is a heady prediction and it is not even internally supportable by statistical extrapolation. Examination of the figures shows that the rate of decline in the number of firms has itself declined in recent years (F. 47 and 48, J.S. 68a). Argument that the industry will probably level off in 10 or 15 years at a quite large competitive population of from 100 to 125 firms is as consistent with these figures, and with all that is in the record, as is a prediction of a drastic decline in the future. It is understandable that the trial court would not accept counsel's prediction without some reliable assurance from the witness stand by some qualified expert or trade witnesses. Under customary rules, the judge had no choice but to resolve doubts against the party having the burden of proof.

But a "dramatic" trend also is argued on the ground that the percentage of industry sales by the first 25 companies has increased from 42% in 1942 to 77% in 1961 (J.S.

13). No defense is offered by the government for selecting the abnormal war year, 1942, as the base year for this comparison nor for using the top 10 or top 25 instead of the top two, four or eight.[6] One is certainly called for. But even so, these statistics do not make a reliable case by themselves. In fact, the increase in the percentage of the first 25 companies from 1957 to 1961 was distributed among 13 different firms not one of which increased more than 2.3% and, characteristically of a competitive industry structure, the remaining firms experienced either slight drops in percentage or remained constant (F. 45, J.S. 64a-67a). Examination of the figures on the first 10 firms will reveal a similar story (F. 45, J.S. 64a-67a).

The government offered no evidence whatever of the actual nature of the beer industry, of the necessary scale of efficient company operations, of the distribution and selling characteristics and peculiarities of the industry, and of other facts and trends actually known to witnesses. In the face of this absolute lack of necessary evidence, the trial judge could surely not reasonably have been expected to have faith that the above statistics would tell a sufficient story upon which to conclude that a violation of law had been shown.[7]

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[6] When government counsel was asked by the court to explain the significance of the chart showing the percentages of the top 25, the only response was "We have another chart showing the top 10" (Transcript 182; F. 49, J.S. 69a).

[7] The government admits the weakness of its evidence by referring to extra-judicial statements and opinions not of record from two magazine articles (J.S. 14, n. 8). If these statements or opinions were admissible at all, they should have been offered in the form of exhibits or testimony from the witness stand, subject to cross-examination or rebuttal before the trial judge.

The additional government claim that the Pabst-Blatz merger itself "artificially accentuates, to a significant degree," the alleged trend (J.S. 15) is sheer rhetoric in the face of the figures. The combined market share of Pabst and Blatz in 1957, the year prior to the merger, was 4.49%, which was *less* than Pabst alone, 5.14%, in 1949 (F. 16, J.S. 52a). Moreover, in 1961, the combined percentage of the two, 5.83%, was appreciably less than the share of the two, 6.64%, in 1952, the last year before Pabst sales began to decline (F. 16, J.S. 52a).

2. Failure of Proof that Wisconsin or the Three-State Area Is a Relevant Market Area.

The Jurisdictional Statement attempts to transform the appellant's failure to prove its contentions that Wisconsin and the three-state area are relevant market areas into some sort of "novel" question (J.S. 17). Actually, a "novel" question is raised only if, contrary to the express language of Section 7, the requirement of relevant market determination is read out of the statute. This Court has repeatedly held that proof of a relevant market, defined both in terms of product and geography, is a necessary predicate to a consideration of the effects of any merger on competition.[8] It is readily demonstrable from the Opinion, Findings and Jurisdictional Statement why plaintiff failed to prove to the trial court's satisfaction that Wis-

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[8] *United States* v. *E. I. duPont deNemours & Co.*, 353 U.S. 586, 593 (1957); *Brown Shoe Co.* v. *United States*, 370 U.S. at 324, 328, 339; *United States* v. *Philadelphia National Bank*, 374 U.S. at 362.

consin or the three-state area are relevant sections of the country within the meaning of Section 7.[9]

At trial both sides accepted the *Brown Shoe* standard of proof of the relevant market:

> "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant." *Brown Shoe Co.* v. *United States,* 370 U.S. at 336-37.

The trial court has also tested the proof by the market definition standard of *Philadelphia Bank*:

> "Therefore, . . . as we recently said in a related context the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies,' Tampa Elec. Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (emphasis supplied) . . . ." *United States* v. *Philadelphia National Bank,* 374 U.S. at 359 (Op., J.S. 13a-14a and J.S. 18a, n.9).

What is the "pragmatic" evidence which the government now claims made a prima facie case that as a matter of "commercial realities" either Wisconsin or the three-state area was an area of effective competition as defined by this Court? It really consists of only one circum-

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[9] Pabst does not dispute the government's contention that under the law and decisions something less than the United States as a whole can be considered a relevant geographic market; its position here is simply that the evidence presented below *failed to prove* that either of the smaller areas alleged is a relevant market area. Of course, the plaintiff did have the burden of proof on the geographic market question, *United States* v. *Philadelphia National Bank,* 374 U.S. at 334.

stance—the market share percentages of the merging parties are more favorable to the government when viewed in the narrower context than in the national market (Wisconsin, 24% at the time of the merger; the three-state area, 11%; the nation, 4.49%, J.S. 27-8).

The government is understandably attracted to the possibility of inflating the relevant percentages. But the validity of such percentages is totally dependent upon the integrity of the market definition urged. What evidence is there to support this definition? A search of the Jurisdictional Statement, as well as the Opinion and Findings, discloses that there is none at all, as the trial judge held. Virtually all that appears is a theory, advanced by government counsel, that breweries sell more beer in the territory near the plant.[10] This theory is argued for several pages in the Jurisdictional Statement (J.S. 20-26).

The trial judge specifically considered this "home territory" contention and specifically found that there was no evidence to support it (F. 30, J.S. 58a). The Jurisdictional Statement challenges this finding but the effort to prove it "clearly erroneous" turns, not on the record, but entirely on the ruminations of counsel who concede that they cannot explain why such a local territory phenomenon exists, if it does (J.S. 25).

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[10] The government asserts without record reference that "Blatz sells 41% of its beer in Wisconsin" (J.S. 21). Actually, the court found that the percentages of national Blatz sales made in Wisconsin were as follows (F. 26, J.S. 56a):

1957	31.36 %
1958	23.49
1959	19.51
1960	17.49
1961	17.02

The record itself shows that the government's generalization is not reliable. More Blatz beer was sold in Michigan from 1958 to 1961 than in Wisconsin, even though it was not brewed in Michigan (F. 25, J.S. 56a; F. 13, J.S. 50a). In 1961, Blatz provided a higher percentage of Michigan's requirements (15%, GX 198) than of Wisconsin's (13%, GX 190), was sold in every state except one (F. 14, J.S. 51a), and was brewed in only one (Wisconsin) of the four states (Michigan, Wisconsin, Ohio and Indiana) leading in sales of the Blatz brand (F. 13, J.S. 50a; JX 59). From 1952 to 1961, Pabst enjoyed virtually as high or higher share of the market in each of three southern states (South Carolina, North Carolina and Georgia), many hundreds of miles from any of its plants, as it did in Wisconsin (computed from JX 18-21, 50-59) and was sold in every state in the nation (F. 14, J.S. 51a).

Even if it were clear that breweries as a rule sell more beer locally, this alone would not justify treatment of the local area as a separate market. It is still incumbent upon the government to advance some "pragmatic" explanation in accord with "commercial realities" to show why this fact has any bearing on the economic issue of what is the relevant market. This it has not done. If its theory has any reality at least one of its 71 proposed witnesses should have testified to facts demonstrating it.[11]

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[11] The Jurisdictional Statement makes an abortive effort to segregate each state on the basis of Pabst and Blatz pricing but is contradicted by the record. The government asserts that "Pabst adopted a separate pricing policy [for Pabst brand] in each State, and while in some cases a uniform price prevailed throughout a multi-State area, it was more common for the price to vary even as between neighboring States (GX 115)" (J.S. 26-27). GX 115 plainly indicates that Pabst brand prices did not in most cases vary from state to state. For example, in the following adjacent states the price

Reference to the Opinion and detailed findings of the trial judge shows that he not only held against the government theory on the facts, but had before him a great preponderance of evidence showing that neither Wisconsin nor the three-state area could be set apart as separate market areas (Op., J.S. 9a-22a). Specifically, he found that competition in the beer business crosses Wisconsin boundary lines in all directions in such magnitude that the state could not possibly be considered an economically distinct entity (Op., J.S. 17a; F. 18-22, J.S. 52a-55a). Wisconsin, where both merging parties were located, produces three and one-half times as much beer as it consumes (Op., J.S. 10a; F. 18, 19, 20, J.S. 52a-54a). At the same time, it imports from other states one-fourth of its total consumption, a figure which has been steadily increasing in recent years (F. 21, J.S. 54a; computation from JX 60-78, GX 257). In 1961 the second, sixth and eighth largest sellers in Wisconsin were out-of-state brewers (JX 78, GX 257). Indeed, 40% of the breweries selling beer in Wisconsin are located outside the state (F. 22, J.S. 55a).

In the face of this evidence, the government has conceded that "Wisconsin is not an economic island," "State boundaries do not necessarily have intrinsic commercial significance," and that the "Wisconsin figures taken

(Footnote [11] continued)
of a case of 24 12-oz. returnable bottles of Pabst beer to distributors on July 30, 1958 was $2.32: Wisconsin (actually $2.31742), Minnesota, Iowa, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Colorado; the price was $2.46 in Illinois, Tennessee, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana; and it was $2.43 in Michigan, Indiana, Kentucky and Ohio. Concerning Blatz pricing the government asserts "Pabst sold . . . Blatz . . . at a higher price in [Wisconsin] than in any other [state]" (J.S. 27). The record shows that by taking account of taxes and discounts the price of Blatz to distributors was higher in Alabama, Oklahoma and South Carolina than it was in Wisconsin (GX 256, 124, Transcript 106-7).

alone" may "give a somewhat inaccurate picture" (J.S. 23, 26, 27). Nonetheless, it urges that even if its theory is not completely sound, some indeterminate part of it should be accepted. It would be well to recall the warning of Professors Kaysen and Turner that "without a minimally reasonable definition of markets, criteria based on quantitative shares become whimsy," *Antitrust Policy: An Economic and Legal Analysis* (1959) 134.

As for the three-state area, the finding of a failure of proof that it was a relevant market was based on a total lack of evidence (F. 40-42, J.S. 62a-63a). The Jurisdictional Statement adds nothing to this void and the available record evidence shows the same pattern in the three states as in Wisconsin. Thus, while the three-state area was a beer surplus area, nearly 25% of the beer it consumed was produced outside of the area (computed from JX 91-100, GX 257); roughly 40% of its output was consumed outside of the three states (computed from JX 9-11, JX 19-21, JX 91-100 and GX 257); and the leading sellers of beer in the area compete in an area which is very much larger than the three states (see JX 32-46, 91-100). In view of this record it is very clear why the court concluded that the plaintiff failed to prove the relevance of the disputed sections of the country.

Even if the government had established one or the other of the above areas as a relevant market, it still would not have made a *prima facie* case. There is no evidence whatever, other than bare market shares, of the effect of the merger within either of these areas. Even at face value, the percentages are not high enough to activate the presumption of effect outlined in the *Philadelphia Bank* case, 374 U.S. at 363, and the government admits that these percentages cannot be taken at face value (J.S. 27-28). More-

over, the *Philadelphia Bank* presumption also requires a showing that the merger "results in a significant increase in the concentration of firms," and as pointed out above, this merger has been shown to have had no effect on concentration.

CONCLUSION

The government lost below because of serious failures of proof. These deficiencies are clear on the face of the detailed Opinion, Findings and Jurisdictional Statement now before the Court. It is the function of an appeal to correct errors of the trial court, not to repair deficiencies in plaintiff's proof. The government's evidence did not measure up to its complaint allegations and the judgment of the lower court should be affirmed.

Respectfully submitted,

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